

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment with respondent or did claimant suffer an intervening accidental injury with a subsequent employer?
2. What is the appropriate date of accident in this instance?
3. What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board (Board) finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant began working in the roofing industry in 1980, with his employment with respondent beginning in 1990. Originally, claimant ran a roofing crew but, in 1991, he started doing sales and warranty work, which required claimant to inspect roofs, crawl into attics, carry ladders, carry shingles and make minor repairs. Claimant continued in this capacity through the entire year of 2001. However, in approximately July 2001, claimant began experiencing problems in his right hip. Claimant continued working, with the pain spreading to his low back. Claimant went to his primary health care doctor, Dr. Steven Charochak, on November 7, 2001. He was referred by Dr. Charochak to a specialist, James H. Garner, Jr., M.D., an orthopedic surgeon, and ultimately was referred to Dr. Garner's partner, Brian E. Healy, M.D., an orthopedic surgeon, for treatment. Dr. Healy first examined claimant on December 27, 2001, diagnosing spondylolisthesis at L5-S1 with damage to the L5-S1 disc and degenerative disc disease at L4-5. Dr. Healy recommended a decompression and spinal fusion, but claimant was reluctant to undergo the surgery at that time.

Claimant continued in his employment with respondent. However, in January of 2002, claimant's job duties were altered somewhat when he began managing the gutter and siding department of respondent's company. Claimant continued performing the warranty work, although the gutter and roofing job began taking more than the majority of his time. Claimant estimated he was spending 75 percent of his time on the gutter and siding management duties, with approximately 25 percent of his time spent doing roofing repairs. He acknowledged that during the management-duty time, he still had to climb roofs and make measurements, but the physical activities of his job had lessened

somewhat. Claimant's hip and back problems continued to worsen through June 15, 2002, when he terminated his employment with respondent.

At some point, claimant was advised that respondent was going to sell the gutter and siding division, which claimant worried might cost him his job. He determined that he should purchase the gutter and siding department, which he did, starting a new limited liability company (LLC) on or about June 15, 2002, owned by claimant and his nephew, Jim Evans. Claimant continued operating this new LLC until November 2002, at which time he underwent the surgery originally recommended by Dr. Healy. Claimant's condition progressively worsened to the point where in November 2002, he could no longer function in his job. He testified that his pain was so great that while someone would be talking to him, he would be unable to concentrate on the conversation.

Claimant underwent a decompression and spinal fusion on November 6, 2002, with Dr. Healy determining that claimant was at maximum medical improvement on July 22, 2003. Dr. Healy rated claimant at 25 percent to the whole person based upon the fourth edition of the *AMA Guides*,¹ finding claimant fit into the DRE Category V.

Claimant was referred by Order of the ALJ for an independent medical examination on November 17, 2003, with Edward J. Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic diagnosed claimant with a lateral disc protrusion complicated by spondylolisthesis. Dr. Prostic found claimant to have suffered a 20 percent impairment to the body as a whole based upon the fourth edition of the *AMA Guides*.² Dr. Prostic was asked, on cross-examination, whether claimant's ongoing roofing activities through November 2002 continued to accelerate or aggravate his condition. Dr. Prostic acknowledged that if claimant continued to go onto rooftops and continued to measure roofs and assuming that claimant's complaints were accelerated, that would indicate that the activities were continuing to worsen his condition. Claimant acknowledged that in November 2002, his work stopped because he reached the point where he could no longer handle the pain.

The ALJ determined that claimant had suffered a series of accidental injuries, with his condition worsening into November 2002. As the LLC formed by claimant is not a named party to this case, the liability of that company will not be determined at this time. The ALJ determined that claimant's condition as of June 15, 2002, was a non-surgical condition, which did not prevent claimant from working. He found that claimant left respondent's employment in order to continue doing the same work that he had performed at the time of his employment with respondent.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

The ALJ also noted that both the 20 percent and 25 percent impairment ratings issued by Dr. Prostic and Dr. Healy respectively did not differentiate between claimant's impairment during the time he worked for respondent and the time he continued working for his own LLC. The ALJ went on to determine that because the ratings failed to give an accurate picture of claimant's impairment for the injury with respondent, claimant had failed to prove by a preponderance of the credible evidence any impairment resulting from those injuries with respondent. The Board affirms that finding.

The ALJ went on to find, citing *Lott-Edwards*,³ that when multiple insurance carriers are involved in a repetitive injury case, they are liable for the medical treatment and temporary total disability compensation which occurs during their respective periods of coverage. The insurance companies are precluded from passing their liability to the insurer with the coverage on the determined date of accident. Accordingly, any medical expenses (or temporary total disability compensation) incurred by claimant while employed by respondent would be the responsibility of the respondent and its insurance carrier on the risk at the time the expense was incurred.

In this instance, the Board finds claimant's date of accident to be November 5, 2002, the day before claimant's surgery and the last day claimant performed the duties which caused him his ongoing aggravation.⁴ As such, claimant's request for additional permanent partial general disability under K.S.A. 44-510e, which was denied by the ALJ, is also denied by the Board. Again, any permanent partial general disability under K.S.A. 44-510e to which claimant would be entitled would be assessed against the LLC for which claimant was employed through November 2002, leading up to the date of his surgery. However, as that LLC is not a party to this action, the potential liability of that LLC will not be determined at this time.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 6, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

³ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

⁴ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Dated this ____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Mark E. Kolich, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier Liberty Mutual
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier Continental Western
Michael R. Lawless, Attorney for Respondent Mid Continent Specialists, Inc.
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director